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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 245

MAURICE STECKLER, Administrator c. t. a. of the Estate of
David Steckler, Deceased, &c.,

Petitioner,

against

THE PENNROAD CORPORATION, et al.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT AND BRIEF
IN SUPPORT THEREOF**

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Petitioner,

against

THE PENNROAD CORPORATION, et al.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioner prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of that court entered on May 11, 1943 (R. 77), affirming a judgment of the United States District Court for the Eastern District of Pennsylvania, entered on April 6, 1942 (R. 13), granting defendants' motion for judgment on the pleadings and dismissing the complaint in the above entitled action.

Statement of Matters Involved

This is a derivative action. Plaintiff is the administrator c. t. a. of the estate of a deceased stockholder of Pennroad Corporation (herein referred to as "Pennroad"), a Dela-

ware corporation. The defendants, excepting Pennroad, were or are directors of Pennroad or representatives of the estates of deceased directors.

The Pleadings

The amended complaint alleges that Pennroad, in violation of Section 54(2) of the Public Service Law of New York (Chapter 48 of the Consolidated Laws, L. 1910, c. 480, as amended), purchased prior to 1931, and has since held, approximately 19½% of the voting capital stock of Boston and Maine Railroad (herein referred to as "Boston and Maine"), a railroad corporation "organized and/or existing" under the laws of New York and also under the laws of Massachusetts, Maine and New Hampshire; that said purchase, in so far as it exceeded 10% of the said stock of Boston and Maine, was void and of no effect; that no valid title to said shares was ever acquired by Pennroad; that the defendant directors wrongfully caused Pennroad to purchase said shares in violation of said statute; and that as a result thereof Pennroad suffered great loss and damage (R. 21-33).

The amended complaint further alleges that the purchase and holding of the said shares were also in violation of Section 5 of Chapter 156, and Section 2 of Chapter 181, of the General Laws of Massachusetts (Tercentenary Ed., 1932, Vol. II, p. 1955, Mass. Acts, 1913, c. 597; *id.*, p. 2449, Mass. Acts, 1894, c. 381, as amended), and in violation of the express provisions of the certificate of incorporation of Pennroad (R. 34-37).

The joint and several answer of all of the defendants admits that Pennroad purchased, and has continued to hold, approximately 19½% of the said stock of Boston and Maine, but denies that said purchase and holding were in violation of the statutes referred to in the amended complaint and the provisions of the certificate of incorporation of Pennroad (R. 39-60).

The Statutes Involved

The Applicable New York Statute

Section 54(2) of the New York Public Service Law (Chap. 48 of the Consolidated Laws, L. 1910, c. 480, as amended), in so far as applicable here, provides:

"* * * no stock corporation of any description, domestic or foreign, * * * shall purchase or acquire, take, or hold, more than ten per centum of the voting capital stock issued by any railroad corporation * * * organized or existing under or by virtue of the laws of this state * * *. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation, in violation of any provision of this chapter, shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such railroad corporation * * * or shall be recognized as effective for any purpose."

The Applicable Massachusetts Statutes

Section 5 of Chapter 156 of the General Laws of Massachusetts (Tercentenary Ed., 1932, Vol. II, p. 1955, Mass. Acts, 1913, c. 597), in so far as applicable here, provides:

"No corporation, unless authorized by a special act still in force, shall purchase, acquire, take or hold, directly or indirectly, more than ten per cent of the total capital stock of any domestic corporation authorized to carry on within the commonwealth the business of a railroad, * * *."

Section 2 of Chapter 181 of the General Laws of Massachusetts (Tercentenary Ed., 1943, Vol. II, p. 2449, Mass. Acts, 1894, c. 381, as amended), in so far as applicable here, provides:

"A foreign corporation * * * shall not engage or continue in any kind of business in this commonwealth the transaction of which by domestic corporations is not permitted by the laws of this commonwealth."

Questions Presented

1. Do the provisions of Section 54(2) of the Public Service Law of New York, regulating railroad corporations "organized or existing under or by virtue of the laws of this state", apply to a consolidated railroad corporation holding a charter from other states as well as from the state of New York?
2. Does a railroad corporation organized under the Railroad Law of New York, Article 4, Sections 140-143, and also under the laws of other states, subject itself to the restrictions and duties pertaining to strictly New York railroad corporations?
3. If Section 54(2) of the Public Service Law of New York is applicable to a consolidated railroad corporation, is it entitled to recognition in litigation in another forum to which such consolidated corporation is a stranger?
4. Are the directors of a corporation liable to such corporation in a derivative action at common law for losses resulting from the purchase of shares of stock in violation of Section 54(2) of the Public Service Law of New York, or does the statute permit only penal or injunctive relief in a proceeding brought by the public authorities of the state of New York?
5. If the directors of a corporation are liable at common law to the corporation for the losses resulting from the purchase of shares of stock of a consolidated corporation in violation of Section 54(2) of the Public Service Law of New York, may a derivative action against such directors be maintained in a federal court, having jurisdiction based upon diversity of citizenship, in a state to which the consolidated corporation in question is a stranger, or is such action maintainable only in the state of New York?

6. Is Section 54(2) of the Public Service Law of New York in violation of the Commerce Clause, Article 1, Section 8, of the Constitution of the United States, and in conflict with the amendment of June 16, 1933 to the Transportation Act of 1920, 49 U. S. C. A., Section 5 (Act of June 16, 1933, c. 91, Section 202, Title II, 48 Stat. 217, 219, as amended)?
7. Was the purchase of 19½% of the stock of Boston and Maine in violation of the provisions of the certificate of incorporation of Pennroad which prohibited said corporation from exercising in any state any power which a domestic corporation of said state could not exercise?

Similar questions are presented with respect to Section 5 of Chapter 156, and Section 2 of Chapter 181, of the General Laws of Massachusetts, above referred to.

Reasons for Granting the Writ

1. The decision of the court below that a consolidated railroad corporation is not "organized or existing" under the laws of the state of New York, within the meaning of Section 54(2) of the Public Service Law of the state of New York, is a decision of an important question of local and general law probably in conflict with applicable local decisions and with the practice of the New York Public Service Commission (see Brief, Point I, pp. 10-13).
2. The decision of the court below, in failing to hold that the consolidation of a New York corporation with corporations of other states under the New York Railroad Law, Section 141, resulted in subjecting the new consolidated railroad corporation to the restrictions and duties of a strictly domestic railroad corporation, including the duty to comply with Section 54(2) of the New York Public Service Law, is a decision of an im-

portant question of local and general law probably in conflict with applicable local decisions and with the applicable decisions of this Court (see Brief, Point I, pp. 13-14).

3. The decision of the court below that the applicable New York and Massachusetts statutes regulating control of consolidated railroad corporations by stock ownership constitute local regulations not entitled to recognition by a federal court in a state in which said consolidated corporation is not chartered is a decision of an important question of local and general law probably in conflict with applicable local decisions (see Brief, Point I, pp. 11, 16-18).
4. The decision of the court below that this derivative action is not maintainable in a federal court in Pennsylvania is a decision of an important jurisdictional and conflict of laws question probably in conflict with applicable local and federal court decisions, and with the provisions of the Judicial Code, Section 51, 28 U. S. C. A., Sec 12, as amended (see Brief, Point III, pp. 19-21).
5. The decision of the court below that a derivative action may not be maintained for losses sustained as a result of the violation of the applicable New York and Massachusetts statutes, but that only the public authorities of New York and Massachusetts may enforce the provisions of said statutes, is a decision of an important question of local and general law probably in conflict with applicable local decisions (see Brief, Point II, pp. 18-19).
6. This case presents for the first time the question whether the amendment of June 16, 1933 to the Transportation Act of 1920, 49 U. S. C. A., Section 5 (Act of June 16, 1933, c. 91, Sec. 202, Title II, 48 Stat. 217, 219,

as amended), supersedes Section 54(2) of the Public Service Law of New York, Section 5 of Chapter 156, of the General Laws of Massachusetts, and similar statutes of other states regulating the control of railroads engaged in interstate commerce (see Brief, Point V, pp. 25-26).

Importance of the Questions Presented

The questions herein raised with respect to the regulation by states of consolidated corporations are important questions of first impression, not the subject of judicial decisions by this Court. Whether or not consolidated corporations are subject to the prohibitions of statutes enacted by one of several charter states, which by their provisions are applicable to corporations "organized or existing" under the laws of said state, will tend to determine the extent to which consolidated corporations are regulated by state legislation. If, as the courts below have held, consolidated corporations are not subject to said statutes, then such corporations are effectively removed from state regulation, for there is no body of state laws relating to the regulation of consolidated corporations as such. It is to be noted that the Circuit Court of Appeals, in its opinion, has expressed doubt as to the answer to this important question (R. 71).

This case raises equally important jurisdictional questions. The court below has held that even if the present action could be maintained in New York, a federal court in Pennsylvania, having jurisdiction based on diversity of citizenship, could not hold the directors of a corporation liable for losses sustained by said corporation by reason of the violation of Section 54(2) of the New York Public Service Law. As a practical matter, derivative actions against directors of corporations are brought where the directors reside and can be served. Such defend-

ant corporations may be served in any district where such corporations reside "or may be found" (Section 51 of the Judicial Code, as amended by Act of April 16, 1936, c. 230, 49 Stat. 1212, 28 U. S. C. A. 112). In the instant case the individual defendants could be served only in Pennsylvania; Pennroad only in Delaware or Pennsylvania. The defendants could not be served in New York. If the federal courts will not entertain derivative actions against directors for losses resulting from acts which are made illegal by virtue of the laws of states other than that in which the directors reside, and in which the action is brought, directors may commit illegal acts free from any liability for resulting losses to their corporation so long as said acts do not violate the laws of the state in which they reside.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

Dated: August 6, 1943.

MAURICE STECKLER,
Administrator c. t. a. of the Estate of
David Steckler, deceased,
Petitioner.

EMIL WEITZNER,
JAMES HOWARD MOLLOY,
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